Bail Slip:-

CRL.RC.No.1439/04

That the accused Viz Ramakannan, was directed to be released on bail as for order of this Court dated 4.10.2004 and made in Crl.MP.No.9089/04 in Crl.RC.No.1439/04

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.11.2006

CORAM:

THE HONOURABLE MR. JUSTICE S. TAMILVANAN

Crl.R.C.No.1439 OF 2004

Ramakannan Petitioner/Accused

Versus

Chettiar and Co.,
rep. By its Partner
K.Ganesh Krishna through
His power Agent
G.Thangaraj
No.9,Anderson Street
Chennai-600 093. Respondent/Complainant

Revision filed under section 397 & 401 Cr.PC against the Judgment of Additional Sessions Judge/Fast Track Court No.V, Chennai made in Crl.Appeal No.11 of 2004 dated 02.08.2004. judgment of conviction and sentence imposed by the XV Metropolitan Magistrate, Chennai, made in C.C.No.5482 of 2000 dated 18.12.2003, confirming.

For petitioner : Mr.R.Sankarasubbu

For respondent : Mr.F.M.Iqbal

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O R D E R

This criminal revision is directed against the judgment of conviction and sentence imposed in Criminal Appeal No.11 of 2004, dated 02.08.2004 confirming the conviction and sentence imposed by its judgment in C.C.No.5482 of 2000 dated 18.02.2003.

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2. The revision petitioner is the accused in the case registered on the complaint given by the respondent herein under Section 138 of the Negotiable Instruments Act. According to the respondent/complainant, towards the business transaction, the revision petitioner/accused had to pay a sum of Rs.1,14,471/- to the respondent, for a period from 09.05.1998 to 09.09.1998 and towards part payment, the revision petitioner issued a cheque bearing No.628595 dated 28.03.2000 drawn on Vijaya Bank, Vadapalani Branch, for a sum of Rs.83,407/- in favour of the respondent/complainant and requested the complainant to present it for collection on 28.03.2000. Accordingly, when the cheque was presented by the respondent herein, through Bank of Rajasthan Limited, N.S.C Bose Road, Chennai, the same was returned by the Vijaya bank on 29.03.2000 with an endorsement, 'Funds insufficient' and therefore, the respondent issued a legal notice, the original of Ex.P.4. Though the notice was received by the revision petitioner, he had not chosen to send any reply. Hence, the respondent herein lodged a criminal complaint under Section 138 of the Negotiable Instruments Act.

3. On the side of the respondent/complainant, the complainant himself was examined as P.W.1 apart from examining the Assistant Manager of Vijaya Bank, Vadapalani, as P.W.2 and documents Exs.P.1 to P.8 were also marked. The dishonoured cheque bearing No.628595 for a sum of Rs.83,407/- was also marked as Ex.P.3.

4. According to the revision petitioner, the undated cheque was issued by him only as a collateral security on 09.09.1998 and nearly after a lapse of two years, the respondent herein had filled up the cheque with the date 28.03.2000 and misused the same. Therefore, the complaint given by respondent, itself was not legally maintainable.

5. On the side of the revision petitioner/accused, the Managers of Vijaya bank and Bank of Rajasthan were examined as D.W.1 and D.W.2. The certified copy of the statement of accounts obtained from Vijaya Bank was marked as Ex.D.1 and the statement of account obtained from Bank of Rajasthan was marked, as Ex.D.2.

6. Considering the oral and documentary evidence, the trial Court convicted the revision petitioner/accused, under Section 138 of the Negotiable Instruments Act, against which the petitioner preferred appeal before the Additional Sessions Judge, who confirmed the conviction and sentence imposed by the Trial Court and dismissed the appeal, aggrieved by which this criminal revision has been preferred.

7. It is not in dispute that the revision petitioner and the

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respondent herein were having business dealings. According to the learned counsel for the revision petitioner, the dishonoured cheque Ex.P.3 was issued only an undated cheque as security for the amount payable by the revision petitioner, as on 09.09.1998, and the amount was also paid, but the cheque was misused by the respondent/complainant.

8. In support of his contention, the learned counsel for the revision petitioner, drew the attention of this Court to the Bills, Ex.P.2 series, issued by the respondent/complainant, to the revision petitioner, wherein at page-22 of the typed set, Bill No.782 dated September 4th, 1998, the cheque has been referred as Vijaya bank cheque No.628595. Similarly, in cash bill No.798 dated September 9th, 1998, the same has been stated as Vijaya Bank, cheque No.628595. Further, the respondent/complainant in his evidence, during cross-examination, has clearly admitted that the aforesaid bills issued by the respondent dated 04.09.1998 and 09.09.1998 contains cheque No.628595. The learned counsel appearing for the respondent/complainant, has also not disputed the fact that the aforesaid cheque number available in the printed cash bills dated 04.09.1998 and 9.9.1998. The learned counsel for the petitioner, by handing over the signed cheque, the revision petitioner had authorised the respondent to fill it up and present the same for payment and therefore, he cannot question the same. On the other hand, the learned counsel appearing for the revision petitioner would contend that as per the Negotiable Instruments Act, a cheque has to be presented within a period of six months. Here in this case, as admitted by the respondent herein, the cheque was handed over on 09.09.1998 itself, but strangely after filled up the date as 28.03.2000, it was presented for payment after one year and six months. Therefore, according to the revision petitioner, the respondent cannot fix the criminal liability on the revision petitioner, after a lapse of one year and six months, after the issuance of the undated cheque.

9. As contended by the learned counsel for the revision petitioner, Ex.P.3 cheque was not a post dated cheque. On the other hand, it was an undated cheque handed over on 09.09.1998 itself. It is seen that the date on the cheque was not filled up by pen, though the name of payee, amount in figures and words were written by pen. Strangely a rubber date stamp has been used to affix for the date 28.03.1999. Even in the judgments of the trial court, as well as the first appellate court, it has been held that the disputed document is an undated cheque and not a post dated cheque. Therefore, it has to be decided in the revision, as to whether a complaint dated 24.05.2004 under Section 138 of the Negotiable Instruments Act, based on an undated cheque that was handed over by the revision petitioner, on 09.09.1998 would be legally maintainable?

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10. In order to enlighten this Court on the legal aspect, the following decisions were cited:

i.Angu Parameswari Textiles (P) Ltd., and others v. Sri Rajam And Co. (2001-Vol.105 Company Cases -105)

ii. M.S.Narayana Menon alias Mani v. State of Kerala and another (2006 AIR SCW 4652)

iii.Y.Sreelatha @ Roja Vs. Mukanchand Bothra (2002-1-LW(Crl.) 271)

iv.M/s. Cement Agencies rep. By its Managing Partner, Vijayawada v. Vijaya Babu and Another (1997(4)Crimes 273)

v.Narayana Menon Alias Mani Vs. State of Kerala and another (2006(6) SCC 39)

vi.ShriIshar Alloys Steels Ltd., v. Jayaswals NECO Ltd., (AIR 2001 SC 1161)

11. In addition to the aforesaid arguments, the learned counsel for the revision petitioner would contend that as per the findings of the trial Court, as confirmed by the appellate court, the total amount payable by the respondent was Rs.1,14,471/- and under Ex.P.2, Rs.55,907/- has been paid to the respondent/complainant and the balance would be Rs.58,564/- and therefore, the cheque for Rs.83,407/- would certainly be for a higher amount, due and payable on the alleged dated, 09.09.1998.

12. In support of his contention, the learned counsel for the revision petitioner has cited the decision reported in Angu Parameswari Textiles (P) Ltd., and others v. Sri Rajam And Co. (2001-Vol.105 Company Cases -105), wherein this Court has held that cheque must be issued towards discharge of whole or part of the debt and if a cheque is issued for a higher amount, then the amount due or payable, due to the dishonour, the cheque would not create any cause of action under Section 138 of the Negotiable Instruments Act. Here in this case, as found by the courts below, the amount due and payable would be less than the amount specified in the dishonoured cheque as contended by the learned counsel for the revision petitioner.

13. The learned counsel for the respondent has cited a decision of this Court reported in Y.Sreelatha @ Roja Vs. Mukanchand Bothra (2002-1-LW(Crl.)271), wherein this Court has held thus:

> "As per Section 118, 138 and 139 of the Negotiable Instruments Act, the Court "shall presume" the liability of the drawer of the cheque for the amount for which it was drawn on accepting the consideration."
>
> "until the contrary is proved, the following presumptions shall be made;
>
> a. of consideration - that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated for transferred for consideration."

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Here in this case the revision petitioner himself has not examined himself as a witness, but in support of his contention, he examined the Manager of Vijaya Bank and the Manager of bank of Rajasthan in order to substantiate that the amounts were realised by the respondent, through the said banks by producing Exs.D.1 and D.2, statements of accounts relating to the banks.

14. The Honourable Supreme Court of India has held in the decision reported in M.S.Narayana Menon alias Mani v. State of Kerala and another (2006 AIR SCW 4652) that if the accused has discharged his initial burden, the burden is reverted back to the prosecution and on the failure of the respondent to discharge the burden so shifted on him, and in view of the same, the conviction of accused was set aside by the Honourable Apex Court. In the said case, the cheque was issued for the purpose of discounting which appeared to be probable and that the accused had discharge his initial burden, and the court held in such circumstances, that the burden is shifted on the complainant and failure to discharge the burden so shifted on the complainant, resulted the conviction of the accused, being set aside.

15. Here in this case, admittedly the undated cheque was signed and handed over on 09.09.1998, to the respondent/complainant. It is not in dispute that a cheque should be presented in the bank for collection, as per the Negotiable Instruments Act, within a period of six months from the date of issuance of the cheque. As contended by the learned counsel for the respondent, the date of the cheque has to be considered for computing the period of limitation. Here in this case, it is not a post dated cheque, but only an undated cheque and as per the evidence, it had been handed over on 09.09.1998 itself, but presented nearly after one year and six months from the aforesaid date by filling up the date as 28.03.2000, by way of affixing rubber stamp.

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16. In support of his contention, the learned counsel for the revision petitioner has cited a decision reported in M/s.Cement Agencies rep. By its managing partner, Vijayawada vs. Vijaya Babu and Another (1997(4) Crimes 273) rendered by the Andra Pradesh High Court, wherein the Honourable High court of Andra Pradesh has held as follows:

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"If time barred cheques can be encashed even after the expiry of the specified time, it will create so many anomalous situations which are likely to be used by unscrupulous litigants. For all these reasons, the appeal fails and it is accordingly dismissed."

17. As per the Negotiable Instruments Act, limitation has been prescribed and as such, though a signed cheque would lead to the presumption of authorising the drawee to fill it up, and present it for payment, the limitation of six months prescribed under the Act, cannot be altered by way of an undated cheque being filled up after one year and six months. In this case, it has been proved that the undated cheque was handed over on 09.09.1998 to one year and six months prior to the date available in the cheque, and therefore, it cannot be legally presumed that the revision petitioner had authorised the respondent to fill it up and present it at any time even after the statutory period of limitation, according to his convenience. This Court is of the considered view that filling up an undated cheque against the limitation prescribed under the Negotiable Instruments Act would be against the legislative mandate of the said Act and would create an anomalous situation likely to be misused by unscrupulous litigants. Therefore, I am of the view that the undated cheque issued and handed over on 09.09.1998 would not create the presumption that the revision petitioner had authorised the respondent to fill up the date as 28.03.2000, one and half years after the same was handed over to be presented for payment, and therefore, the alleged cause of action based on Ex.P.3 is not sustainable to maintain the criminal complaint against the revision petitioner.

18. Under Section 138 of the Negotiable Instruments Act, as the validity of a cheque is only for 6 months from the date of issuance, the implied authorisation for filling up the cheque should certainly be within the limitation of six months and not more than the period of limitation. As it has been proved that the undated cheque was handed over one year and six months prior to the date of the cheque, I am of the considered view that the dishonour of the same would not create any criminal liability on the revision petitioner/accused. The courts below without considering the legal aspect under the Negotiable Instruments Act and also the factual circumstances, have given the concurrent finding which has to be construed as a manifest error of law and to meet the ends of justice, it warrants the interference of this Court. Accordingly, I find it reasonable to allow this criminal revision petition.

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19. In the result, without prejudice to the civil right, if any available to the respondent, the criminal revision petition is allowed and accordingly the conviction and sentence imposed by the Courts below are set aside and the amount of Rs.25,000/- deposited by the revision petitioner is ordered to be refunded to him.

ksr

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1.The Additional Sessions Judge
and Fast Track Judge No.V,
Chennai.

2.The XV Metropolitan Magistrate,
Chennai

3. Do Through The Chief Judicial Magistrate,
Egmore, Chennai.

4. The Principal Sessions Judge, Chennai.

AVA(CO)
SR/1.3.2007

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